

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

SUNBELT CRANES, CONSTRUCTION &
HAULING, INC.

and

Case 12-CA-22406

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 925, AFL-CIO

Christopher Zerby, Esq. for the General Counsel.
Thomas M. Gonzalez, Esq. and *Jason L. Odom, Esq.*
(*Thompson, Sizemore & Gonzalez*), of Tampa, Florida,
for the Respondent.
Mr. Michael Kell, of Mango, Florida, for the Charging
Party.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: The charge was filed by the International Union of Operating Engineers, Local 925, AFL-CIO (Union) against Sunbelt Cranes, Construction & Hauling, Inc. (Sunbelt or Respondent) on July 30, 2002.¹ The charge was amended on September 3 and October 25, and an amended complaint was issued on April 28, 2003 alleging that the Respondent violated (1) Section 8(a)(1) of the National Labor Relations Act, as amended (Act), by (a) interrogating employees about their union activities, (b) threatening employees with discharge if they engaged in activities on behalf of the Union, (c) telling employees that it would be futile to select the Union as their collective-bargaining representative and that Respondent would never sign a collective-bargaining agreement with the Union, and (d) threatening to reduce employees' wages if they joined the Union, (2) Section 8(a) (3) and (1) of the Act by discharging its employees Jonathan Pollock and Ernest Snider. The Respondent denies violating the Act as alleged.

A trial was held in this matter on July 9 and 10, 2003, in Tampa, Florida. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a Delaware corporation, with an office and place of business in Tampa, and a facility at Bradenton, Florida, has been engaged in the business of crane rental, servicing and operation, hauling and rigging. During the 12 months before the issuance of the

¹ All dates are in 2002 unless indicated otherwise.

complaint herein, the Respondent admits that it purchased and received at its Tampa office and at its jobsites in Florida goods valued in excess of \$50,000 directly from points outside the State of Florida. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Donald Granowicz purchased the involved Company in 1985. It was formerly Sims Crane, and Sims' employees were members of the Union. Sunbelt hired every one of the former Sims employees who wanted to work for Sunbelt, which has always been non-union. The then business agent of the Union, Bryce Ashmore, gave Donald Granowicz a collective bargaining agreement to sign but Granowicz refused, indicating that he would pay into the dues for any of the operators who requested him to do so. Twice before, in 1988 and 1992 or 1993, the Union tried to organize the Respondent's employees and both times the Union lost the election. Donald Granowicz testified that some of the employees who were union advocates in the prior organizing attempts, like Jamie Cabal, who still works for Sunbelt, and Kenny Sigmon, continued their employment with Sunbelt after the organizing drives. Donald Granowicz also testified that he had been dealing with Michael Kell as the representative of the Union for a couple of years; that two or three times Kell tried to get him to sign a collective bargaining agreement but he refused; and that after a petition for election was filed on July 18 by the Union, General Counsel's Exhibit 3, he told Kell not to come back on the Respondent's property.

Kell, who is an assistant business agent/organizer for the Union, testified that he visited Sunbelt's Tampa location three times, and the Bradenton location one time on the property and one time off the property; that he spoke with Donald Granowicz twice and the third time Granowicz told him that if he came back on Sunbelt's property he would be arrested; that the first time he spoke with Donald Granowicz in about March 2001 he told him about (a) the possibility of Sunbelt using the Union to man the jobs that Sunbelt could not man, and (b) a one-page project agreement to pay wages and fringes for the operators that are used out of the Local, which is under the terms and conditions of the equipment rental agreement; that the Union has several agreements with different rates with employers other than the rental agreement; and that Granowicz raised the question of whether the Union could give him different rates.

Donald Granowicz presently owns 52 percent of Sunbelt. The remainder is owned by three individuals, namely his son Victor, his daughter Christie Granowicz, and the individual in charge of the Bradenton operation, Hank Clark, who holds the title of Vice President. The Respondent has 35 employees at its Tampa facility, 9 of whom are strictly crane operators and another 9 operate cranes occasionally, and 15 employees at its Bradenton operation, 9 of whom are strictly crane operators. Donald Granowicz is the CEO of the Respondent. His son Victor is the Chief Operating Officer of Sunbelt and he runs the operation on a day-to-day basis.

Mitch McDonald, who was the General Manager and at the time of the trial herein was a Vice President at Sunbelt, telephoned Donald Granowicz, who was on his way to work, on July 18 and told him that there was someone from the Union in Sunbelt's Tampa yard trying to organize the employees. Donald Granowicz testified that he told McDonald to ask the Union representative to leave the yard. Donald Granowicz knew that Pollock was one of the employees who had been talking with the Union representative on July 18. Subsequently Donald Granowicz telephoned his nephew, Ed Granowicz, in Bradenton to find out if a Union representative had shown up at that facility. The Union representative had already left but

Donald Granowicz told his nephew that if the Union representative shows up again, to tell him that he can not speak with Sunbelt's employees in Sunbelt's yard during working time, which is the same message he gave to McDonald.

5 McDonald testified that about 6:30 a.m. he passed Sunbelt's yard on his way to pick up something to eat before he went to work and he saw Pollock, Snider and several other employees, along with two individuals he did not recognize, standing around talking in the yard; that he used his mobile phone to call the dispatcher, Terry Childers, to find out why the employees were not working but that line was busy; that he then called Pollock, whose number 10 he had programmed on his telephone for a prior job, to ask him what was going on, and Pollock told him that they were talking to a Union official because they were trying to go union; that he told Pollock that the Company has always been non-union; and that he telephoned Donald Granowicz. McDonald further testified that he did not know that Pollock put him on a speakerphone and Snider did not say a word to him during this conversation. McDonald testified 15 that when he told Pollock that since he, McDonald, had been at Sunbelt it had always been non-union Pollock said "are you threatening me on my fucking job" (transcript page 99); that he then said "no, I got to go, good bye" (transcript page 99); that he did not tell Pollock that he "sounded like one of those union fucks" (transcript page 100); that he never threatened Pollock's job; and that he called Donald Granowicz and told him that a group of employees were out front talking 20 to a union official, Don said "okay, thanks," (transcript page 100) and then they discussed the jobs they had that day.

Jonathan Pollock testified that Dennis Stansel, who is an officer of the Union, held a union meeting in Sunbelt's parking lot on July 18; that employees signed union authorization for 25 representation cards; that he signed such a card, General Counsel's Exhibit 8; that at one point Childers approached the group and said that he was surprised it was taking them so long to do this; that a few minutes later Childers came back out and said that he was told that Stansel had to leave the property; that he went inside to the main office as Stansel was leaving the property; that at about 6:45 a.m. McDonald called him on his Nextel phone and asked him what the Union 30 representative was doing there, he told McDonald that it was none of his business, McDonald asked him who was involved, he told McDonald that it was none of his business, he turned the speakerphone on, McDonald said "you sound just like one of those union fucks and ... if ... [you] continue to organize workers, ... [you] might as well go find another job right now" (transcript page 158), Earnie Snider, who was present along with Childers, Dwight Maloney, 35 George Walters and Ed Dysse, told McDonald that he needed to think about what he is saying, McDonald told Snider that "he better shut the fuck up or he's next" (transcript page 158), McDonald again asked who was involved, after getting a nod from the employees, he told McDonald who was involved, and at that point the conversation ended; that he punched in at 6:55 a.m. and he normally starts work at 7 a.m.; that he then went to Childers to find out if he 40 still had a job; and that Childers called McDonald and then Childers told him that McDonald said that he still had a job and McDonald did not know what Pollock was talking about as far as getting fired.² On cross-examination Jonathan Pollock testified that he signed the union authorization card on July 16; that he arranged the meeting by asking Kell if he could send a union representative to the Tampa yard to speak with the crane operators and oilers; that he, 45 Stansel, Don Rebston, Snider, Walters, Maloney, and Kurt Butcher met out in the open at 6 a.m. where they could be seen from the office; that the meeting had gone on for about 15 to 20 minutes before Childers, who he knew was a supervisor, first approached them while union authorization cards were being signed in the parking lot that day; that he clocked in at 7:03 a.m. on July 18; and that in his September 29 statement to the National Labor Relations Board

50 ² Childers did not testify at the trial herein.

(Board) he indicated that when Childers hung up from talking with McDonald, Childers said that McDonald said that Pollock still had a job and McDonald did not know what Jonathan Pollock was talking about, because he never threatened to fire Jonathan Pollock. On redirect Jonathan Pollock testified that he signed the petition for the Union on July 18; and that he signed the Union authorization card while he was at the Union hall.

Snider testified that in May or June 2002 he spoke a Union business agent about trying to organize; that on July 18 he signed a union authorization card, General Counsel's Exhibit 9, in Sunbelt's parking lot when Union business agent Stansel came to Sunbelt at 6 a.m. to sign all the operators up who were interested in having a union; that at 6:20 a.m. Childers asked the group what they were doing, they told him that they were signing union authorization cards to join the union, and Childers said it did not surprise him any; that this meeting ended when Childers came back out and said "he had to be the dickhead, ... [they] needed to leave the property, ... he had been contacted by Mitch McDonald, and Mitch gave the order to have everyone leave the property" (transcript page 263); that the people who had not signed up yet went across the street to finish; that he went into the office with Jonathan Pollock; that while they were in the office McDonald called Pollock on his Nextel and Pollock put the speakerphone on; that McDonald asked Pollock what was going on and Pollock told him that they were signing authorization cards; that McDonald told Pollock that he sounded like one of those "union fucks and he told Johnny that if he wanted to join the union he was fired and he better start looking for another job" (transcript page 263); that he took the radio from Pollock and he told McDonald to be careful of what he said; that he gave the radio back to Pollock who turned it back on phone; that he did not recall hearing any response from McDonald; that he, Pollock, Childers, Rebston, Walters, Butcher, Maloney, and he thought Dave May were present when McDonald spoke over the Nextel; and that their work day generally starts at 7 a.m. Snider further testified that seldom did Sunbelt have anything planned to start at 6 a.m.; and that he never heard another employee tell McDonald, who was in charge of the operators, that he should watch what he said. On cross-examination Snider testified that the first time Childers approached the group he asked what they were doing and Jonathan Pollock told him that they were signing cards to organize the union; that either he or Pollock said they were organizing; that in his statement to the Board he indicated "[a]bout 6:28 a.m. when dispatcher ... Childers came out of the office and asked us what was going on, Pollock and I told Childers we were talking to the union organizer because we were considering organizing a union" (transcript page 293); that when Childers came back out about 20 minutes later Childers said he had to be a "dickhead" and tell us to get off the property; that in his statement to the Board he indicated "Childers said he talked to McDonald, and McDonald wanted union rep Stansel to leave the property" (transcript page 294); that when he went into the office Childers, Pollock, Rebston, Walters, and Maloney were there; that he was not sure if Dysse was there because he is a truck driver; that when McDonald called Pollock on the Nextel phone and Pollock put it on speakerphone he heard McDonald tell Pollock that he was fired, McDonald ask what the union was doing there, Pollock tell McDonald that he was trying to organize and they were signing union organizing cards, and McDonald said "you sound just like one of those union fucks" and "you're fired" (transcript page 300); that he did not hear Pollock say "its none of your business" (transcript page 299) or tell McDonald which employees were involved; that in his statement to the Board he indicated that McDonald told Pollock that if he was going to go union, he was fired, he could just find another job; that he understood McDonald to be saying that Pollock was fired if he wanted to be union; that he then told McDonald that he might want to be careful what he said; that he has talked on a Nextel to someone who was on speaker and he could not tell because you do not have the Nextel against your ear in that you are holding it like a CB microphone in front of your mouth; that when he told McDonald that he should be careful what he said McDonald said nothing; that Pollock flipped it off speaker phone and went back to telephone right about then; that he did not hear anything else after that; and that at the behest of Pollock he made notes about what happened and he

gave them to Pollock the day Pollock was fired. Snider further testified that when he and Jonathan Pollock first talked about bringing the Union in he had just lost a week's paid vacation and it had been four years since he had received a raise. Subsequently Snider testified that with a Nextel two way you are either listening or you are speaking, and while you are speaking you can not hear anything.

Rebston, who is a crane operator with Sunbelt out of its Tampa yard, testified that on July 18 he arrived at work at 6:30 a.m., a meeting with a Union representative had already started, and he was late; that Childers asked the Union representative, Stansel, to leave Sunbelt's Tampa yard; that he, Rebston, then went into the dispatcher's office; that Childers, Snider, Pollock, and Maloney were there; that McDonald called Pollock and wanted to know why Pollock was trying to organize the employees; that McDonald said that if Pollock was going to go union, he might as well leave now; that Pollock then asked McDonald if he was threatening him with his job and he told McDonald that he could not do that just because he was trying to organize; that McDonald was on the speakerphone and Snider told McDonald that he could not be saying stuff like that because he could get in trouble for that; and that he did not know if McDonald responded to Snider's comments. On cross-examination Rebston testified that after the employees had signed cards Donald Granowicz told him that he knew he, Rebston, had signed the card, Donald Granowicz asked him why he was involved, and he told Granowicz that he was involved because of the benefits like the retirement; that he had signed a union card and he had signed a petition, General Counsel's Exhibit 2; that when McDonald spoke with Pollock on July 18 McDonald told Pollock that Sunbelt was not going to go union; that McDonald could very well have told Pollock that he was "acting like one of those union fucks" (transcript page 490); that Pollock asked him to write something up regarding Pollock's conversation with McDonald on July 18; and that he might have written something up but he did not give it to anyone.

On July 18 Donald Granowicz received a petition signed by 12 of Sunbelt's employees, including Pollock and Snider. General Counsel's Exhibit 3. The petition reads as follows:

THIS LETTER IS TO ADVISE THAT THE UNDERSIGNED EMPLOYEES HAVE AUTHORIZED THE INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE) LOCAL 925, ... TO REPRESENT US AS OUR EXCLUSIVE COLLECTIVE BARGAINING REPRESENTATIVE IN A UNIT OF CRANE OPERATORS. PLEASE NOTE THAT WE COMPRISE A MAJORITY OF THE UNIT OF 20 EMPLOYEES.

WE ARE DELIVERING THIS LETTER DIRECTLY TO YOU SO THAT SUNBELT CRANES CONSTRUCTION & HAULING INC. CANNOT DOUBT OUR SINCERITY, INTENTIONS OR MAJORITY. WE REQUEST THAT SUNBELT CRANES CONSTRUCTION & HAULING, INC. MAKE IMMEDIATE ARRANGEMENTS WITH LOCAL 925 TO DISCUSS THE TERMS AND DURATION OF A COLLECTIVE BARGAINING AGREEMENT.

Donald Granowicz reviewed the petition when he received it, and he subsequently declined to recognize and bargain with the Union. Shortly after receiving this petition, Donald Granowicz received the aforementioned petition for an election. Donald Granowicz testified that Sunbelt did not campaign against the Union, it did not put out any literature or give any speeches against the Union either at the Tampa or the Bradenton facilities.

Kell testified that he dropped off a contract on July 18 at Sunbelt's Tampa office after Donald Granowicz received the petition and asked for the contract; that the contract had a "Favored Nations Clause"; that a little over a year before he testified herein the Favored Nations

Clause was put back into a 1-year agreement unbeknownst to him; and that the Favored Nations Clause would be taken out because it was destructive to organizing efforts.

Jamie Cabal testified that he signed the Union petition, General Counsel's Exhibit 2,

A Sunbelt change in employee status form for Pollock with an effective date of July 27, General Counsel's Exhibit 4, indicates "Discharged, no misconduct." Donald Granowicz testified that he fired Pollock because on Friday July 26 Pollock and a friend of his threatened one of Sunbelt's managers and placed his daughter, Christie Granowicz's, life in jeopardy; that his daughter telephoned him at home and told him that she, her boyfriend, her boyfriend's brother and McDonald had stopped at a club at Apollo Beach, Florida and Pollock was there with his wife, another gentleman and a woman; that his daughter told him that the gentleman with Pollock approached McDonald and threatened to physically assault him, the club's bouncer, who used to work for Donald Granowicz at a restaurant/bar that he owns which Christie Granowicz operates, removed the gentlemen from the club, as his daughter and her group were leaving the club the man with Pollock threatened that he had a gun and he was going to shoot McDonald, the woman with that man drove an automobile straight at his daughter and swerved at the last minute, and the police were summoned; that it was his understanding that Pollock told the other man "to show him your gun and you better be careful, he'll shoot your ass" (transcript page 52); and that before he terminated Pollock he was told by the Sheriff's Department that the individual who threatened McDonald was a convicted felon who was out on probation. Donald Granowicz further testified that his daughter Christie telephoned him at home on a Saturday or Sunday morning; that he filed a complaint with the Hillsborough County Sheriff's Department over the incident³; that McDonald may have told him about the man with Pollock having a criminal record and he, Donald Granowicz, verified it with the Sheriff's Department; and that he decided to fire Pollock when he got off the telephone with his daughter, Christie, because he felt that Pollock had endangered his daughter's and McDonald's lives.

McDonald testified that on Friday July 26 he took a customer, Steve Berry, out to dinner at the Circles Restaurant, which is owned by Donald Granowicz and run by Christie Granowicz; that after dinner Berry went home; that he, Christie Granowicz, her boyfriend Pat MacDonald, and her boyfriend's brother Bob MacDonald went to Sidelines, which is a bar at Apollo Beach; that he saw Pollock at Sidelines, and as he passed Pollock's wife he asked her what she was doing there to which she responded that they were just hanging out and it was her first time there; that while he was speaking with Christie, Pat, and Bob, a man approached him and asked him if his name was Mitch McDonald; that the man shook his hand harshly and said "I want to congratulate you on being the biggest piece of shit in the world. I think what you're doing to my friend is a bunch of bullshit" (transcript page 106 and 107) and then the man walked away; that he Christie Granowicz, her boyfriend and his brother left Sidelines; that as they were leaving the man, who he later found out was Donald Cable, started walking toward him and Sideline's bouncer grabbed Cable in a headlock and took him out of Sidelines; that while he was in Sidelines parking lot with Christie Granowicz, her boyfriend, and her boyfriend's brother, Pollock, his wife, and Cable approached them and Cable said that he had a gun and he was going to shoot all of them; that Cable kept raising his shirt to make it appear like he had a gun there; that he believed that Cable had a back brace on; that a black Ford Mustang, driven by the woman who was with Cable in Sidelines, then came straight at him, McDonald, and Christie Granowicz; that the woman came to within about 10 feet of them and then she turned and

³ The Hillsborough County Sheriff's Office Incident Report, dated July 29, was received as General Counsel's Exhibit 6. Among other things, it indicates that Donald Granowicz "was having a problem with one of his employees, John Pollock ... in reference to union matters."

stopped, saying to him "Mitch McDonald, you piece of shit, I'll call your wife" (transcript page 109); that Cable got into the Mustang and left Sidelines; and that he reported the incident to Donald Granowicz the next morning.

5 Jonathan Pollock testified that he went to Sidelines one time, namely on July 26, and he saw McDonald and Christie Granowicz there; that he did not speak to McDonald or Christie Granowicz while at Sidelines; that he and his wife, her best friend, Laurie Winters, and her boyfriend Cable were sitting in the patio area outside of the bar; that his wife went to the rest room inside the bar, and later when he got up to go to the rest room his wife told him that
10 McDonald was at the bar; that he went to the rest room and returned to the patio; that Cable asked him what the problem was and he told Cable that McDonald had threatened to fire him a week ago over the trying to organize for the Union and it was no big deal; that at about 2 a.m. they were getting ready to leave and he went to the rest room; that as he was returning to the patio he saw Cable inside the bar standing at a table by the door talking to a couple of his
15 friends; that he stopped to talk with Cable and someone came up behind Cable, tapped Cable on the shoulder, and told Cable "you're a piece of shit yourself" (transcript page 162); that Cable engaged in a verbal exchange with the man and the bouncer come up to Cable and put a chokehold on him, choked him, and dragged him out the door; that the bouncer then told him that he and his friends had to get out of there; that he got Cable up, told him that it was time to go, and went to his wife and told her that it was time to go; that when they were in the parking lot the his group and the other group consisting of Christy Granowicz, McDonald, and two other men engaged in a verbal exchange, and he was trying to get Cable into Winters' car; that one of the men in the other group picked up a bottle and asked Cable if he had a gun, saying "[a]re you going to pull a gun on me and shoot me" (transcript page 163); that Winters drove her black
25 Mustang between the two groups which were about 5 to 10 yards apart; that he did not (a) tell anyone that Cable had a gun, (b) threaten to shoot anyone, (c) tell anyone that his friend was going to shoot someone, or (d) ever speak to a Sheriff's Deputy about the incident; that the following day Cable told him for the first time that he approached McDonald in the bar and introduced himself; and that he had not asked Cable to do that. On cross-examination Jonathan
30 Pollock testified that he had maybe three alcoholic drinks that night; that one of the males with Christie Granowicz later in the Sidelines parking lot was the man who had the confrontation with Cable in the bar; that one of the two men with Christie Granowicz picked up a beer bottle and started coming after Cable with it "yelling at him about have you got a gun, you're going to shoot me" (transcript page 213); that the man with the beer bottle in his hand did not go after Cable;
35 that Winters drove her car between the man with the beer bottle and Cable; that when the man with the beer bottle was coming at Cable and asked Cable if he had a gun and if Cable was going to shoot him Cable said that he did not have a gun; that he himself did not say we do not have a gun; that Winters asked McDonald what his wife would say about him being out with Christie Granowicz; that on Saturday July 27 Cable told him that the night before he had gone
40 up to McDonald in the bar, introduced himself, shook McDonald's hand, and told McDonald that he was a "piece of shit" (transcript page 220); that he then realized that Cable made the first move and he told Cable that he did not appreciate it; and that he realized "it was possible that if ... McDonald was trying to fire me, that was a good reason for him to fire me" (transcript page 220). On redirect Jonathan Pollock testified that on the night of July 26 he did not threaten
45 anyone, he did not ask his friend to threaten anyone, and no one said anything about going to shoot anybody.

Kimberly Pollock, Jonathan's wife, testified that she went to Sidelines one time with her husband, her best friend, and her best friend's boyfriend; that they sat outside the bar in the
50 patio area; that she saw McDonald in the bar; that she told her husband that McDonald was there; that Cable asked her husband who McDonald was and her husband told Cable about what was going on at work with the Union; that this conversation took place before her husband

went into the bar; that at about 2:00 a.m. her husband told her that it was time to leave, there had been a confrontation between Cable and the bouncer; that in the parking lot McDonald and Cable had a verbal confrontation; that she walked with Winters to get Winter's car and as Winters drove the car to pick up Cable, she, Kimberly Pollock, walked back to her husband who had stayed behind with Cable; that she did not recall anyone mentioning a gun; and that she never spoke with the Sheriff's Department about this incident. On cross-examination Kimberly Pollock testified that she saw someone with a broken bottle in the parking lot that night; that the person who was holding the broken bottle by its neck did not advance towards anyone; that she walked back to the group before Winters arrived with the car so Winters could not have been driving that fast; that Winters asked McDonald "how his wife would like to know that he was out at a bar with another bimbo." (transcript page 249)

Christie Granowicz, who runs Land's End Marina and Circles Restaurant in Apollo Beach, testified that she went to Sidelines with her boyfriend, Pat MacDonald, his brother, Bob MacDonald, and Mitch McDonald; that while they were sitting at the bar a man, Cable, approached McDonald, shook his hand, pulled him close, said something about you just got nominated for being the biggest, and then pushed away and walked away⁴; that she had been talking to the bouncer at Sidelines, Stephan Joiner, who used to work for Circles Restaurant; that Bob MacDonald and Cable engaged in a verbal exchange and Joiner then dragged Cable out of the bar; that her group proceeded to go to their car and they were standing in the parking lot talking when Jonathan Pollock and Cable come into the parking lot; that Cable acted like he is pulling out a gun, pointed his finger and said "I can put a cap in every single one of you ... pointing at all of us" (transcript page 555 and 556); that "this girl comes flying around the corner in her Mustang at me ... coming at high speeds or whatever, and cuts off at the last second, rolls down the window and started ... telling Mitch she's going to call his wife and tell his wife that she's [sic] out with me and whatever" (transcript page 556); that Bob MacDonald said "if you want to pretend like you're going to point a gun at somebody or act like you're going to pull a gun out" (transcript page 557); that her boyfriend's brother was "mouthing off and I had to kind of shut him up a little bit" (transcript page 557); that no one had a beer bottle in their hand; that she called her father the next morning; and that she did not take any part in the decision to terminate Jonathan Pollock. On cross-examination Christie Granowicz testified that she did not see Jonathan Pollock inside the bar at Sidelines; that outside in the parking lot Jonathan Pollock did not say anything, "[h]e was standing there with the guy when the guy was threatening to put a cap in our heads" (transcript page 562); that Bob MacDonald said "if you're going to threaten to pull out a gun ... you'd best have one to use" (transcript page 564); that just Bob MacDonald and Cable exchanged words; and that her group left and she did not see a Sheriff's Deputy that night; and that the next day she gave a statement to a Sheriff's Deputy. Subsequently Christie Granowicz testified that in the parking lot Cable lifted his shirt in front and he reached into the front of his pants when the remark was made about a gun; and that Cable had a black belt or a back brace on.

Joiner testified that he is manager, doorman, and bartender at Sidelines, which is a restaurant and bar; that he once worked at Circles Restaurant; that he saw Christie Granowicz with some other folks at the rail bar; that he spoke to Cable and warned him not to start anything; that later he told Cable to leave and when Cable did not he removed Cable from the club; that he had Cable in a half nelson and Cable lost consciousness on the way out; and that he put Cable on the ground and told Cable's friend to get Cable out of there unless he wanted to go to jail. On cross-examination Joiner testified that he called the Sheriff's Department that night

⁴ Christie Granowicz did not know the man's name but for ease of reference he will be referred to herein as Cable.

but the Deputy did not want to do a report; that subsequently he was called to come to Circles where he did give a report, General Counsel's Exhibit 12, to a Sheriff's Deputy; and that later Christie Granowicz came back into the bar from the parking lot and said that the guys that he threw out tried run them over.

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McDonald testified that on Saturday July 27 he spoke with Donald Granowicz regarding what had happened the night before. McDonald further testified that subsequently he, Donald Granowicz, Christie Granowicz, and her boyfriend went to Circles Restaurant where they were met by Sheriff's Deputy Alvarez and the bouncer from Sidelines, Joiner.

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On Monday July 29 Jonathan Pollock went to work, clocked in, and left when he found out that there was no work that day. That night he telephoned Mark Coates, who is a salesman with Sunbelt who dispatches sometimes, and asked him if there was any work the next day. Coates told him to come to work the next day.

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On Tuesday July 30 Donald Granowicz, in the presence of McDonald, Victor Granowicz, and two Hillsborough Deputy Sheriffs in Granowicz's office, told Pollock that he was terminated. McDonald testified that Pollock said that he was trying to tell Cable "not to mess with ... [McDonald]." (transcript page 111) Jonathan Pollock, who had worked for Sunbelt since October 1997 as a crane operator, testified that Donald Granowicz told him that he was fired because of the an incident which occurred on the prior Friday night; that he told Donald Granowicz that he had nothing to do with his daughter, he said nothing to McDonald, he tried to keep his friend Cable from hurting someone or getting things started, and it was just a lot of verbal confrontation; and that he also told Donald Granowicz that it was awful funny that McDonald threatened to fire him just a week or so earlier, and now he is being fired over something like this. On cross-examination Jonathan Pollock testified that he told Donald Granowicz that what occurred on the night of July 26 had nothing to do with him, Pollock, he never spoke to McDonald or anyone in the group of people he was with that night, and he tried to keep Cable from getting into a fight; that he told Donald Granowicz that it was awful funny that just a couple of weeks age McDonald threatened to fire him for what was going on with the Union and now he was being fired; that Donald Granowicz said that McDonald did not threaten to fire him regarding the Union organizing, that did not happen; that he told Donald Granowicz that he had five witnesses, including Childers, who heard the threat over the speakerphone; and that Donald Granowicz said that Cable had spent time in jail.

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After he was fired, Jonathan Pollock drafted some notes on July 30, Respondent's Exhibit 2, about what happened on July 18 and the night of July 26. The notes are dated and signed by Jonathan Pollock. With respect to the former, the notes read, as here pertinent, as follows:

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At approximately 6:40 PM ... [Childers] returned and said it was time for him to be a 'Dickhead' and asked Dennis Stansel to leave the property. He said Mitch McDonald had told him to do it. Dennis moved across the street with Kurt & Dwight while the rest of us went inside with ... Childers. At approximately 6:45 AM Mitch McDonald called me ... and asked what the Union Rep was doing there. I at that point put him on speakerphone so the whole office could hear what was said. He asked me who was involved & I told him it was none of his business. He then got belligerent and said I sounded just like one of those 'union fucks' and that if I vote yes for the Union I might as well go find another job right now. We ended up giving him the names involved and he hung up.

witnesses
Ernie Snyder, Kurt Butcher, Dwight Maloney

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Terry Childers, [and] Ed Dysse

On cross-examination Jonathan Pollock testified that the statement he gave to the Board on September 29 indicates (a) Childers did not specify on July 18 who wanted the union representative to leave but he, Jonathan Pollock, assumed that it was McDonald, and (b) the first time he did not answer McDonald when he asked who was involved because the operators did not indicate that it was okay to tell McDonald. With respect to the night of July 26 and the early morning of July 27 the notes read, as here pertinent, as follows:

I had to walk by him [McDonald] to go to the restroom, but didn't say anything. When I came back a friend with me asked what my problem was with that guy (Mitch). I told him how he threatened to fire me and the whole story. We all stayed outside for the rest of the night, going periodically to the restroom or [to] get drinks. At the end of the night [at] approx. 2:00 AM I went in to the restroom getting ready to leave and as I was coming out my friend had stopped to talk to 2 of his friends at a table by the dart boards. As we were talking one of the other males with Mitch's group got in my friend's face & started calling him a piece of shit & things like that . I thought they knew each other because I didn't realize who it was. By the time I did, the bouncer had my friend around the neck in a choke hold, My buddy passed out and was drug out the door.

At that point we went to leave & the other people kept talking, badgering my friend & his girlfriend. I kept trying to tell my friend to drop it, lets leave, it ain't worth it. At no time did I ever encourage him to continue. I kept telling him to stop while the other people (male) continued badgering. We finally left with no altercation other than verbal yelling at each other.

In the middle of August 2002, according to the testimony of Donald Granowicz, he went to the Bradenton facility to talk to the operators there. He testified that he was asked to come and speak with the employees there; that he could have told the Bradenton employees that he did not understand why they wanted a union; and that he believed that he did talk about pay and retirement. Donald Granowicz further testified that he goes to the Bradenton facility once or twice a year; that Clark asked him to come to Bradenton since the operators asked to speak with him; that the operators wanted a raise and Jamie Cabal said "[w]hy don't you just give us \$2 more an hour and all this shit will go away" (transcript page 55); that the employees complained about losing money in their 401(k) plans; that the employees brought up the other enterprises he owns and he told them the other enterprises had nothing to do with Sunbelt and he never took money out of Sunbelt to support any of his other corporations; that he told the employees that he could give certain people raises and lay certain people off or he could try to keep going as is; that when he brought up equipment payments Cabal commented "I get a new crane in lieu of a raise" (transcript page 57); that Cabal had complained that he did not feel that the crane he previously operated was safe anymore; that he told the employees that Sunbelt was non-union and he would do everything within the law to stay non-union; and that while Rebston usually works out of Tampa, he was in Bradenton at the time and he attended this meeting.

Michael Johnson, who is a crane oiler and truck driver working out of Sunbelt's Bradenton yard, testified that about one week after the operators and oilers at Bradenton signed union authorization cards, Donald Granowicz came to Bradenton to talk to the employees; that Eddie Granowicz called him on his Nextel and said that Donald Granowicz had come down and wanted to talk to the employees; that Donald Granowicz was agitated and he felt that the employees had done something to him personally by going to try to be represented by the Union; that one of the employees, Jamie Cabal, explained to Donald Granowicz that it was just business, the employees did not feel that they were being treated fairly, the Company had

recently taken back a week's vacation from the guys that had been there 15 years, and it had been over three years since the employees had a raise; that Donald Granowicz said that what the Union said was not true, Sunbelt was not making that much money, he would not deal with the Union, he would lock the gate before he would deal with the Union, he had no intentions of dealing with the Union, and the employees could do whatever but no Union thing was going to happen as long as he owned Sunbelt; that under the Union contract mechanic Doug Loudermilk would be making less pay than he was making but in benefits he would be making more with the Union contract, and Donald Granowicz asked him why he was willing to join a union and make less money; that Donald Granowicz said that the Union had attacked his family in the past and it had been a personal attack against him and they tried to intimidate him and he had no intentions of dealing with these people; and that Donald Granowicz said that the employees "could do whatever the hell ... [they] wanted to, it wasn't going to work" (transcript page 397). On cross-examination Johnson testified that Donald Granowicz insulted his intelligence by telling him and the other employees that he never pulled any money out of the crane company to do work on his other businesses, the marina or the restaurant, because he, Johnson, had done crane work and never gave Donald Granowicz a ticket; that Donald Granowicz told the employees that the cranes were not making any money and there was not any more money coming; that one employee, Jamie Cabal, told Donald Granowicz that that was because he "suck[ed] all the money out of the crane company and used it at the marina [Land's End] and ... at the restaurant [Circles]" (transcript page 436); that Donald Granowicz said "that he had been personally attacked by the union in the past when he tried to negotiate with them when the company first started, and that there would be no union. As far as he was concerned, he could lock the gate up before he'd have a union in it" (transcript page 437); that Donald Granowicz told the employees that they "could do what we wanted to, ... he was not going to negotiate with our Union" (transcript page 438); that Donald Granowicz told the employees that if they joined the Union, they would lose their vacation time, Granowicz said that he had talked to other crane companies and they told him that the way to get out of paying for vacations was to lay the employee off and then he would not work continuously as required to get vacation time; that Donald Granowicz said that he would not ever have to pay for vacations; that Donald Granowicz told the employees that under the collective bargaining agreement certain people would not be making as much money as they were making at the time; and that Donald Granowicz "on July 31, 2002" (transcript page 440) did not threaten any employee if they engaged in activities on behalf of the Union.

Mitchell Sigmon, who has worked for Sunbelt for 18 years out of its Bradenton yard, testified that in August 2002 Donald Granowicz came to Bradenton to speak to the employees; that Ed Granowicz called him on his Nextel out in the yard and told him to come into the office Donald Granowicz was there; that Donald Granowicz asked the employees what they were trying to do to him and they said that they had asked Clark about getting a raise and after that one weeks vacation was taken away; that when the employees asked Donald Granowicz about the raises and the vacation, he said the company needed it, and there wasn't any money there; that just before he left Donald Granowicz told the employees "if you didn't like it, there's the door" (transcript page 454); that Donald Granowicz's last words at this meeting were "I will not sign a union contract with my last dying breath" (transcript page 455); that the employees had talked to Clark about talking to Donald Granowicz, originally Donald Granowicz denied that Clark had said anything to him, but eventually Donald Granowicz admitted that Clark said something; that Donald Granowicz pretty much said that there was not money for a raise; that Donald Granowicz said that Sunbelt was paying for a package that was worth \$25 or \$26 an hour and he would have someone come to Bradenton to explain the specifics and how the Union was trying to "smoke" the employees (transcript page 456); that no one ever came to Bradenton to explain; that Donald Granowicz asked Doug the mechanic if he wanted to take a cut in pay with the Union and Doug indicated that he did not; and that the last thing Donald

Granowicz said was that on his last dying breath he would not sign a union contract, and nobody was going to tell him how to run his company. On recross Sigmon testified that the employees who had lost a week of vacation without any explanation asked Clark if he could get Donald Granowicz down to Bradenton to talk to them; that Clark told the employees that he had talked to Donald Granowicz several times about it; that he asked Donald Granowicz why he could not charge a couple of dollars extra on the crane and give that to the employees, and Granowicz said that it could not be done; that he could have said "why don't you give us a couple dollars raise and this whole thing is done" (transcript page 469); that Donald Granowicz said that to his last dying breath he would not sign a union contract; that the benefits that he was describing were in the rental agreement; and that he never heard Donald Granowicz say that he would close the Bradenton yard. Subsequently Sigmon testified that he did not hear Donald Granowicz say anything about locking the gate.

Rebston testified that he was at Sunbelt's Bradenton yard about July 31, walked into the office, and he was surprised to see Donald Granowicz there with Eddie Granowicz, quite a few of the operators, and mechanics; that he arrived at the meeting late in the afternoon, at the tail end of the meeting; that the only thing he remembers is they were comparing Sunbelt's scale with the Union's scale; and that Donald Granowicz said that he would fight to the last breath of his life ever going union. On cross-examination Rebston testified that in his statement he indicated that the operators told Donald Granowicz that they did not want to go over Clark's head but they wanted to get more benefits and more hourly pay to bring their wages up to the rest of the crane companies around; that Donald Granowicz never said that he would close the Bradenton yard; that Donald Granowicz said that he would fight the union to his last breath; and that someone at the meeting brought up Jonathan Pollock, and Donald Granowicz said that he was not very pleased with Pollock, he was disappointed with him.

Cabal, who has worked for Sunbelt for almost 19 years as a crane operator out of its Bradenton yard, testified that after the employees had signed cards, Donald Granowicz came to Sunbelt's Bradenton office and spoke to the employees⁵; that Donald Granowicz asked him why are the employees doing this to him; that he told Donald Granowicz that the employees had gone to Clark and asked about a raise because Sunbelt was \$2 an hour or more behind everybody else scale-wise and Clark told them that they were trying to work it out; that Donald Granowicz told him that he had heard nothing from Clark; that other employees, including Rebston who was there on a job, joined the meeting; that Donald Granowicz said that to his last breath he would not have the Union represent employees at his company; that someone else brought up Jonathan Pollock and Donald Granowicz said Pollock would never work for Sunbelt again either, he was done, something had happened involving friends of Pollock and threats, and Donald Granowicz would not have that happen to his family; that Donald Granowicz said that as far as he was concerned there would be no union in Sunbelt if he had to fight until his last breath; that Donald Granowicz said that he was not going to sign a union contract; that Donald Granowicz asked a mechanic, Loudermilk, why he signed a "card of intention to vote union" (transcript page 501) when his pay would not be increased and Loudermilk told Granowicz that he needed a more stable retirement program; that Donald Granowicz promised to send the employees in Bradenton a breakdown of the Respondent's scales but the employees never received it; and that toward the end of the meeting Donald Granowicz conceded that probably Clark did talk to him about wages but it would not have made a bit of difference, this is how it was going to be. On cross-examination Jamie Cabal testified that Donald Granowicz hated to come to talk with the Bradenton employees because for years they

⁵ Jamie Cabal is a member of the Union and he maintains his union book. The Respondent knows this and it used him on a job where it was necessary to use a union operator.

never let up on him, they were blunt and to the point; that Donald Granowicz said that the 401(k) was helping employees and he pointed out to Granowicz that Sunbelt was giving him \$10 a week toward his 401(k); that he told Donald Granowicz that he heard that once Donald Granowicz made his money he did not need his employees; that in the past Donald Granowicz told the Bradenton employees that he could put a sign on a street corner and hire people like them all day long; that Donald Granowicz asked Loudermilk why he would want to make less money under the union contract as a mechanic; that Donald Granowicz might have said he would lock the gates; that he assumed that Granowicz meant that he was going to close the company before a union would get in but he did not believe that Granowicz used those exact words; that he did not remember someone saying why don't you just give us a \$2 an-hour-raise and all of this will go away; and that someone might have asked Donald Granowicz if he could raise the rental rate on the cranes by just a few dollars, and he could give the employees that money.

On or about August 22, according to the testimony of Donald Granowicz, Victor Granowicz telephoned him, while he was in Canada, told him that he was going to fire Snider, gave the reasons for this action, and wanted to make sure he was in agreement with the decision. Donald Granowicz testified that he told his son that if everything happened the way he described it, he did not have much of a choice. Donald Granowicz further testified that his son told him that

Earnie [Snider] was out setting trees, he had called ... [Sunbelt's] dispatcher, was on his phone, was complaining about the fact that he didn't want to be out here setting trees, running this f'ing crane, and to get somebody out to replace him. And while he was talking on the phone and neglecting to do his job, he didn't put the outriggers out, tipped the crane over and damaged the crane.

....

And he [Victor Granowicz] also told me he [Snider] tried to cover up the accident.

On August 22 Childers called McDonald and told him that Snider tipped over his crane. McDonald went to the jobsite. Snider was not there at the time. McDonald and Victor Granowicz, who had also come to the jobsite, decided to call Donald Granowicz. They had to leave the jobsite to get a good phone signal. Victor put the call on the speakerphone so McDonald overheard the conversation. McDonald testified that during this telephone conversation Donald told Victor to terminate Snider because Snider had a favorite saying, namely, "I don't have a dime in it and I don't really care" (transcript page 84), he carried that attitude to jobsites, customers told the Respondent not to send Snider to the job, in the yard he (a) backed over stuff and into trailers to where he busted lights out, and (b) he crashed loads into the front windshield of a crane, and it was obvious that the crane accident on August 22 was caused by the fact that Snider did not extend the outriggers on the left side of the crane; and that when Victor Granowicz told Snider that he was discharged he admitted that the accident was his fault and he said that he was sorry. McDonald further testified that other operators have backed over stuff in the yard but Snider does it more than the others; that Childers complained to him that Snider kept calling in and saying "to get him off that piece of shit crane, that he didn't want to run it no more" (transcript page 112); that about one week before this incident, Snider took the 150 ton crane out of the Tampa yard and was heading to the Port of Tampa without a dolly, which is a frame with axles, to support the boom of the crane; that without the dolly supporting the boom, the load is illegal and if caught there would be a fine of around \$4,000 to \$5,000; that Snider had been at the Port of Tampa two days before and he knew that the Florida Department of Transportation was there; that about one month before this

he spoke with Snider about taking the 150 crane on the road without a dolly, and he told Snider that the dolly should always go with the crane and the only time it does not is when Childers or McDonald authorizes it; that neither he nor Childers authorized Snider not to use the dolly for this Port of Tampa job, and there are no sharp turns between Sunbelt's Tampa yard and the Port of Tampa which would have precluded the use of the dolly; that Respondent's Exhibit 1 are pictures taken August 22 of the crane Snider was operating, laying on its side; that Snider had already unloaded several palm trees at the time of the accident; that Sunbelt's driver David May, who was at the scene of the accident when McDonald arrived, told him and Victor Granowicz that after the accident Snider was filling in the holes made by the outrigger pads which were not extended, and he told Snider "you probably should not be doing that, because there needs to be an investigation" (transcript page 131)⁶; that the wood discs which are supposed to be placed under the outrigger pads to distribute the weight over a greater distance were not used by Snider; that Bill Privett of Privett's Tree Service, which was renting the crane from Sunbelt, was at the jobsite when the accident happened; that Bentzel Mechanical told the Respondent not to send Snider back to a job where he was using the 150 ton crane, which is Sunbelt's money making crane since Sunbelt gets more money renting it than any of its other cranes; that Snider received more money to operate the 150 ton crane than any other crane; and that he, Donald and Victor Granowicz decided to terminate Snider.

Sunbelt's change in employee status form for Snider with an effective date of August 22, General Counsel's Exhibit 5, indicates Discharged for failure to perform assigned job. Donald Granowicz testified that there were several incidents of Snider having an attitude and not wanting to be on a job; that customers have telephoned Sunbelt and requested that Snider not be sent back on a job because he had a bad attitude and was not cooperative; that Snider has worked for Sunbelt for about 15 years; that Snider has always been a fairly strong advocate of unionization; that he has a land development company which rented the crane Snider was operating when he was fired; that Snider usually operated a big 150 ton crane involving one lift and he has an oiler who sets the crane up; that on the day he was fired Snider was operating one of the brand new smaller 40 ton cranes without an oiler, and he had to move the crane as they set the trees around a pond; that it was his understanding that Snider was talking to Sunbelt's Tampa dispatcher, Childers, on his radio phone complaining about the job and asking to be replaced while he was operating the crane, he neglected to put the outriggers out on one side of the crane, and tipped the crane over⁷; and that Sunbelt has a policy that you do not operate a crane without having the outriggers out. Donald Granowicz further testified that there were 30 trees to be planted at the Apollo Beach development site; that he was not there so he did not know how many trees Snider had unloaded before he turned the crane over; that Snider had to reposition the crane as he unloaded the trees around the pond; that it was his understanding that Snider had to take the outriggers in to get around an existing tree and he neglected to put them back out before lifting the next tree off the truck; and that a crane can tip with the outriggers out and typically as the crane went over the outriggers would be blown back into the crane since the outriggers are not made to support the weight of the overturned crane.

Snider testified that he had worked for Sunbelt since September 1987 as a crane operator and truck driver; that he has been a crane operator for 43 years; that a dolly is used to support the boom of a crane to get Sunbelt closer to being legal weight-wise for the Department of Transportation (DOT); that on occasion he has driven a crane without a dolly when he has had to make tight turns to get to a job; that it was understood that he had to use a dolly if he was going anyplace where he might be caught by DOT; that he never received a warning for not

⁶ May did not testify at the trial herein.

⁷ Childers was subsequently fired.

using a dolly until after he was fired and after he was fired he received a warning in the mail from McDonald; that he saw McDonald between August 20 and August 22; that on August 20 he was on his way to the Port of Tampa with a crane and McDonald called him on his Nextel when he was five blocks from the yard and told him to come back to the yard and get a dolly; and that he was aware that DOT hangs out down at the port sometimes.

Snider further testified that on August 21 and 22 he was working at Andalucia Estates in Apollo Beach unloading trees with a brand new 40 ton Terex crane; that the crane was getting stuck in the sand; that on August 21 Snider called Childers and told him that he needed plywood to put under the wheels because the crane was getting stuck in the sand; that he did not get plywood from Childers; that May, Johnson, and Walters were on the job; that the trees were being brought in on Sunbelt's flatbed trucks; that on August 22 May dropped him off at the jobsite and he started the crane up, pulled the outriggers in on one side to get by a tree, and tried to move the crane forward; that the crane got stuck and he called Childers and asked him where the plywood was that he requested the day before; that Childers said that he did not have any plywood; that he jacked the crane up and tried kicking dirt in the holes; that the guy who was supplying the trees, Privett, showed up with a truckload of old rotted plywood and a shovel; that, with the help of Johnson who drove to the site with a load of trees, he filled the holes in, laid down the plywood, and placed plywood at the next place where he was going to stop the crane; that he rolled the crane ahead to the next point and stopped the crane; that he got out of the crane's driving cab and walked around to the crane operator's cab; that Johnson, who was unstrapping trees on the truck said that they did not have riggers to hook the trees up and he told Johnson that was not their job; that the day before some Mexican helpers were doing the rigging on the trees; that he was talking with Johnson over his Nextel because the crane was running and he could not hear Johnson without using the Nextel; that Privett showed up and he was irate wanting to know what was taking them so long; that he told Privett that he had to get some riggers to hook up the trees so that he could swing them off the flatbed and Privett left; that he leveled the crane but he forgot to extend the outriggers on the blind side of the crane and he could not see them since the cylinders for the boom were in the way; that he was trying to get the crane ready to go to work to keep Privett from being upset; that he swung the crane over the good side to the truck to pick up a tree which the riggers had placed nylon straps on; that as he swung the tree around to the other side of the crane it tipped over because he forgot to run the outriggers out; that he was shaken up and Johnson and May came over to see if he was hurt; that he got out of the crane, surveyed the damage and then called Childers to tell him that he had tipped the crane over; that after the accident he dug up the outrigger pads on the outriggers that he did not put out because they were in a bind, the sides had been ripped out of them, he just dug them out to keep them from being damaged any further, and he filled in the holes to keep anybody from tripping on them; that Christie Granowicz showed up at the site and asked him how he was; that Johnson unhooked his trailer from the trailer and drove him to see the doctor designated by the Respondent after they stopped, at the behest of Christie Granowicz, at the marina owned by Donald Granowicz to fill out an accident report; that he was at the doctors for 4 to 5 hours and when he was finished Johnson drove him back to the jobsite; that Victor Granowicz and McDonald were at the jobsite and they asked him what happened; that he told them that he had forgotten to run the outriggers out and so the crane tipped over; and that he did not deny that the accident was his fault. Snider further testified that he arrived at the jobsite that morning at 7 a.m.; that it was hot and humid; that he was sweating from digging the crane out, filling in the holes and placing the heavy, waterlogged, rotten plywood; that when Privett approached him and asked him what was taking so long; that Privett was pretty excited and said that he had a crane down at his yard loading the trees on the trucks and he was paying for that crane which was waiting for the truck to get back and pick up another load; that normally when he goes out on a job where the customer is paying the bill, a bill is made out and he gets the customer to sign it, which was not the case on this job; that he was in the seat of the crane

when Privett was talking to him; that when he actuated the jacks on the outriggers he felt the crane rise and there is a leveling bubble in the crane which he used to get maximum capacity; that on August 21 he positioned the crane eight or nine times and he did not have to retract the outriggers on the blind side of the crane that day; that the boom was originally lower than in the picture, Respondent's Exhibit 1, because when he moved the crane in the sand he kept as much weight over the back end as he could to keep the front end from sinking in the sand; that in his 43 years of operating a crane he had never had a problem like this; that the pad on one of the unextended outriggers was broken off and the other one looked like it was about to break off; that he got a shovel and relieved the pressure on the pad because he did not want any more damage than there was already; that he never denied that he was at fault; that before he went to see a doctor he filled out an accident report at the Land's End Marina and he told Christie Granowicz that he "screwed up, I forgot to run the outriggers out" (transcript page 287); that when he went back to the jobsite Victor Granowicz and McDonald asked him what happened and he told them that he "screwed up, I forgot to run the outriggers out, and ... I'm sorry" (transcript page 287); that Victor Granowicz told him that he was going to have to fire him; and that he then said "well, I guess we have a zero tolerance policy anymore" (transcript page 287).

On cross-examination Snider testified that he was an advocate for the Union in the early 1990s while at Sunbelt and he was not disciplined; that prior to August 2002 he left the dolly for the 150 ton crane between 10 and 15 times, and as a rule someone knew that he was not using the dolly; that generally he left the dolly behind when he knew on that particular day that he would not be able to make a turn if he used the dolly; that he could not rule out having any turns that he would not be able to make with the dolly going to the Port of Tampa because sometimes the Port of Tampa is full of equipment that has been offloaded from ships; that he did not ask permission to take the 150 ton crane to the Port of Tampa without a dolly; that McDonald never told him that he had to tell someone if he was going to take the 150 ton crane out without a dolly; that he understood that he was supposed to take a dolly when he went on the interstate; that he was not going to take the dolly to the Port of Tampa because he did not know how tight it was at the port, DOT was not at the Port constantly, and he did not figure that it would be a big deal; that shortly before this he hauled a cooling tower to St. Petersburg on a semi-trailer, hit a tree limb which was hanging over the roadway, and bent the corner of the cooling tower; that this was not the first time he damages a cooling tower or chiller; that on another job the nylon straps, which were used all the time, cut on the edge of the cooling tower he was lifting and it fell; that he had a saying at work, namely, "I don't give a fuck, I ain't got a dime in it" (transcript page 316); that he asked Childers to get him off "this piece of shit crane" the first day when he started getting stuck; that on August 21 and 22 he was getting paid the same rate he was paid to operate the big crane; that at the end of August 21 he went back to the yard and left the crane at the jobsite; that on August 22 May gave him a ride to the jobsite in a semi-tractor; that on August 22 when he lifted the outriggers to try to drive ahead the crane sank in the sand and he was stuck; that the plywood shown in the pictures in Respondent's Exhibit 1 is the plywood supplied by Privett; that he might have told Privett that he did not want to be there; that on August 22 just before the accident Johnson had a truckload of trees to be unloaded and then May showed up with a truckload of trees to be unloaded; that the crane was stuck that morning for about one and a half hours at the location where he first tried to move it because it took that long for Privett to get the plywood; that when the crane got stuck that morning he called Childers again and told him that he needed the plywood; that Johnson helped him put the plywood under the crane; that he moved the crane about 70 feet and Johnson told him where to stop so that he would be on the plywood; that when he got out of the driver's cab he walked around the right side of the crane to talk to Johnson; that after he tipped the crane over he called Childers and told him that he had "screwed up and the crane had tipped over; that when Childers asked him what happened he told him that he was not sure because at that point in time he was still rattled and ascertaining just what had happened; that the broken pad was still on the end of the

cylinder and if they tried to stand the crane up with that on the end of the cylinder they would bend the cylinder; that he did not hear anybody say that he should leave the scene the way it was; that he filled in the holes because anyone rigging the crane to set it back up could trip in the holes; that he left the jobsite at 10:30 or 11 a.m. and he returned to it at 3:30 p.m.; that he was fired after he told McDonald and Victor Granowicz that he forgot to run the outriggers out; that Respondent's Exhibit 3 is a written statement he dropped off at Sunbelt on August 23 describing what happened the day before; that four other operators had tipped cranes over and they were not discharged, namely Kenny Sigmon, Lefty Lowe, Tufik, and Greg; and that he was not there when these operators had their accidents.

On redirect Snider testified that he filled out the Company's standard accident report at the marina, and while he asked for a copy, he was not given one; and that he could not remember what he wrote in that report.

And on recross Snider testified that the only other operator that he knew who tipped a crane on its side like he did, where the crane had to be righted by some other mechanism and repaired off premises was Sigmon; and that Florida Power and Light asked that he not come back to a job because he had a personality conflict with one of the people who worked there. Snider was recalled and testified that General Counsel's Exhibit 10 is an accident report for Sunbelt similar to the one he filled out at the marina on August 22 but the report is not the one he filled out, it was not completed by him, it was not completed in his presence, he did not know who completed it, it is not his handwriting, and he signed the accident report he filled out. Respondent's attorney indicated that General Counsel's Exhibit 10 was from the Respondent's personnel file and it was received as a company record.

Johnson testified that when he is driving a truck he usually does not have any responsibility for the operation of the crane⁸; that on August 22 he, Dave May, and George Walters hauled palm trees from Ruskin, Florida to Apollo Beach where Snider operated the crane which unloaded the trees; that Sunbelt also had a crane and operator in Ruskin where the trees were dug up and loaded on the trucks; that Snider told him on the radio where to stop his truck; that he would take the binding off the trees; that some Spanish laborers rigged the trees to be lifted off the truck; that on August 21 the crane got stuck; that the first thing on the morning of August 22 the crane got stuck; that Snider had called to get some plywood; that his truck also got stuck and also had to be dug out; that the individual who sold the trees, Privett, showed up with some old, really sorry looking wet plywood which was not the kind they needed but they used it under the tires; that Snider had to pull in the outriggers on the driver's side (left) of the crane to get by an existing tree; that his truck was located on the right side of the crane; that May drove up with a load of trees; that they had spent most of the morning digging out the crane and his truck and they had not unloaded his truck yet; that Privett asked Snider why it was taking so long to get the trees unloaded; that Privett said something to him and he told Privett that he had been stuck most of the morning, "I was a little bit aggravated. It was like 97 degrees out there and I'm driving around in a semi in sand. We didn't have the proper stuff to do the job." (transcript page 383); that when Snider lifted the 30 foot palm tree off the truck and brought it to the left side of the crane, the crane tipped over and was laying on its side; that Snider had a cut on his arm and on his forehead and the glass in the cab was broken; that he then realized that Snider had not run his outriggers on the left side of the crane out; that he called his dispatcher in Bradenton and then Childers and told him that Snider turned the crane over; that Childers asked him if he knew what happened and he said that he did not know yet; that one of the outrigger

⁸ As a crane oiler on the larger cranes he sets the crane up, hauls the counterweights, does most of the rigging, and maintains the crane as far as greasing and oiling the crane.

pads had a big stress crack in it and the other one was in a bind; that Snider got a shovel out and said lets get these pads out; that he and Snider got the pads out and he picked one up and threw it down on the other side of the crane because they did not need to be in the way when they flipped the crane back over; that Snider dug out the other outrigger pad and threw it to the side of the crane; that he filled in one hole and Snider filled in the other hole; that "we weren't really thinking a lot. We were just trying to keep the pad from getting busted, because they were in a bind and the jacks were extended eventually I think they would've probably started bending; that he called Childers and told him that Snider had to see a doctor; that he was told that Snider had to fill out an accident report before he went to see a doctor; that Christie Granowicz, who had shown up at the jobsite, said that she had accident reports at the marina, which was not that far away; that he disconnected his tractor from its trailer and he drove Snider to the marina behind Christie Granowicz; that Snider filled out the accident report at Christie Granowicz's desk; that he believed that he signed the accident report as a witness; that he believed that Christie Granowicz had the accident report; that neither Victor Granowicz nor McDonald nor any manager or supervisor asked him about the accident⁹; that Snider never denied that the accident was his fault, saying right after the accident that he did not run the outriggers out, he just ran the jacks down on that side, when Privett came over and started talking to him he got distracted and did not run the outriggers out all the way; that May told him that they needed to get Snider to a doctor; and that when he returned to the jobsite Walters, who normally operated the involved crane, told him not to lie for his buddy, Snider lost his job, he just doesn't know it yet, and he, Johnson, should not lose his job lying for him. On cross-examination Johnson testified that after he dug it out he placed the outrigger pad where he did to get it out of the way when they flipped the crane back over, which they did; that the holes were 2.5 feet wide and 2.5 feet deep and he did not want to leave holes for someone to step in; that he did not hear anybody tell Snider that he ought not be fooling around with that site and he was standing next to Snider the whole time; that Snider filled one hole in and he filled the other hole in; that in the statement he gave to the Board he indicated that from the operator's seat Snider could not have known that the beams (outriggers) were retracted, because he would have felt the crane rise when he extended the jacks, and he could not see because of the blind side; that as Snider sat in the crane operator's cab the boom would have blocked his view of he left side of the crane; that on the large crane you run the outriggers out from the side; that on the involved 40 ton crane the outriggers are run out from the operator's cab; that he did not tell Snider where to stop so that the back wheels of the crane would be on the plywood; that Snider told him over the Nextel where to stop; that Snider asked Childers for plywood the first day they were on the involved jobsite and again on the second day when the crane got stuck the first thing that morning; that he did not give a statement to the Board, rather he gave it to Kell; and that three days after this accident the Respondent brought him tickets with the Company's name on them, backdated them, and asked him to sign them. On redirect Johnson testified that he never discussed anything with Snider about the outrigger pads, "I just picked them up and walked around to the other side with it" (transcript page 443).

Privett testified that in August he was transplanting some large palm trees at Andalucia, Florida; that he talked to Snider because

as far as I was concerned, he was just milking the clock. He was on the phone. I couldn't get him to unload trees. I had a whole crew come in, was standing around. They were trying to - - for some reason it sounded like he didn't want to be there. He was still on the phone trying to - - he didn't want to work. And I asked two or three times, lets go ahead

⁹ As noted above, according to Johnson's testimony Childers asked him what happened when he first called Childers about the accident.

and unload these trees, and he just - - he was on the phone. He just went yeah, yeah, yeah, and he was on the phone, on the phone.

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I know he was complaining about his gig. Bring another crane drive[r] down here. I don't want to be on this job.

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Privett further testified that he supplied some plywood for the crane since they were stuck once in a while, and they were shoving plywood under their tires; that when Snider was unloading the tree he was talking on the phone; that as Snider swung the tree around to the driver's or the left side of the crane it tipped over; that Snider was shaken up a bit but he did not appear to be hurt to bad; that Snider moved a portion of the outrigger that was stuck in the dirt and he started filling the hole back in; and that both Johnson and May told Snider that he could not mess with that because there will be an investigation, he should not be touching it, shouldn't be messing with it; and that Snider toted some stuff over. On cross-examination Privett testified that the job lasted two days; that he was at the jobsite the first day, he did not know who operated the crane that day, and there were no problems that day; that he did not know who Snider was talking to on the phone; that Snider was on the phone several times during the 30 to 40 minutes Privett was there; that when he heard Snider tell someone over the phone that he did not want to be on the job he, Privett, was not sure if Snider was in the crane or on the ground; that the crane and the truck were running and it was noisy; that he was real close when he heard Snider tell someone on the phone that he did not want to be on the job because he was complaining to Snider that he had a bunch of men on payroll; that Snider was in the operator's cab when he overheard Snider on the phone; that Snider removed the pad at the back of the crane when they stopped him and he did not know who dug up the other pad; that a couple of the truck drivers and another crane operator told Snider that he should not be messing with this, there would be an investigation, photos, he should not be touching it; that at that point Snider stopped; that he thought Johnson helped Snider carry one of the pads over; that Snider never denied to him that he tipped over the crane; and that while he was swinging the tree Snider was talking on the phone and he may have been holding the phone with his shoulder, cradled in his neck.

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Subsequently Privett testified that "Dave [May] and Mike [Johnson] both told him [Snider] - - Dave first told him not to be digging anything up, and Mike agreed with him at that point. But Mike still helped him [Snider] move the thing over there." (transcript page 550)

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Christie Granowicz testified that Victor Granowicz called her and told her that Sunbelt was going to fax a sheet to the Marina so that Snider could see a doctor; and that she went to the jobsite, Snider came back to the marina with Johnson, Snider filled out paperwork that Sunbelt had faxed, and Snider took the paperwork with him to go to the doctor.

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Victor Granowicz testified that he went to the jobsite after Snider's crane tipped over and talked with everyone who was there; that he and McDonald called his father, discussed the situation with him and it was decided that because of (a) what happened, (b) Snider's pattern of a lack or respect for equipment, and for his job, there was no choice; that Snider was one of the most talented and qualified operators at Sunbelt and that is why he was operated the 150 ton crane; that Kurt Butcher replaced Snider on the 150 ton crane and his pay was increased by \$1.50 an hour; that Butcher signed the Union petition; that the first choice to replace Snider was Walters, who he believed signed a card but did not support the Union, but Walters said that it was too much responsibility for him; that Bentzel Mechanical, Florida Power and Light and possibly Carney Development told the Respondent not to send Snider to their jobs ever again; that when he fired Snider he told him that the business is inherently a very dangerous business and putting outriggers out is basic, and he had demonstrated a pattern of disrespect; that it was

his understanding that May told Snider that it would be a good thing to leave it the way it is; that while he thought that Snider tried to cover up the accident and would say that the accident was not his fault, Snider told him that he did not put his outriggers out and the accident was 100 percent his fault; and that he never told Snider his suspicions about any attempted cover up. On cross-examination Victor Granowicz testified that one of the reasons he relied on in making his decision to discharge Snider was that he believed that Snider tried to cover up the scene of the accident; that if Snider had not covered it up, he would still have been discharged; that there is no room for Snider's type of attitude in what Sunbelt does; and that an accident involving Tufik Harub, who had a good attitude and was not that experienced, was caused by the fact that Harub set the crane up on sand which had donnage underneath it, which Clark believed was an honest mistake. On redirect Victor Granowicz testified that Respondent's Exhibit 4 is an accident report for operator Tufik Harub covering the incident when he tipped his crane over; that at the time of his accident Harub had been operating a crane for 3 to 4 years; that Snider was the only one who had multiple accidents in Sunbelt; that it cost more than \$30,000 to fix the crane Snider tipped over, and the crane was down for about two and one half weeks; that that crane rents for \$140 an hour with a four hour minimum; that Sunbelt has a \$25,000 deductible and it did not file an insurance claim which would have affected premiums; and that Sunbelt ended up "eating" (transcript page 602) about \$40,000 because of the mistake. On recross Victor Granowicz testified that Sigmon's crane was damaged in excess of \$100,000 and it was out of commission for 6 weeks to 2 months.

Donald Granowicz testified that Snider was not the first Sunbelt employee to damage a crane; that Sunbelt's employee Irvin Eckerd tipped a crane against a building when he was attempting to place a chiller on a building and he was not fired because it was an honest mistake; and that Sigmon turned over a brand-new crane while working for Sunbelt causing over \$100,000 in damage, and he was not discharged. Donald Granowicz further testified that Rebston, who is a strong union advocate because he needed some time to become fully vested, damaged a crane after the above-described meeting at Bradenton, and he was still working for Sunbelt at the time of the trial herein; that Sigmon, who worked at the Bradenton facility, has an attitude from time to time and he will not work but Clark felt that Sigmon should not be fired because the new crane was the first one Sunbelt bought with a computer on it and Sigmon was still learning about computers; that it was his understanding that Sigmon gave the computer faulty information and instead of reading the chart and not just relying on the computer Sigmon relied on the computer to shut him down and it did not because of the faulty information; that Clark believed that Sigmon made an honest mistake and Clark did not want to fire Sigmon so he went along with Clark; that Sigmon, who has been with Sunbelt from the start, has always been a strong advocate of the Union; that he felt it was an honest mistake when Rebston damaged the crane, Rebston never complains, he takes every job he is sent on, and Sunbelt's customers have written letters of appreciation regarding the work Rebston has done; that he fired Wayne Lowe when he did not properly secure a load he was lifting with a crane, the cable slipped and a pallet of roofing tiles went through three floors of a Holiday Inn, luckily not killing anyone; that he did not fire Wayne Lowe's father, Lefty Lowe, when the ground gave way under his crane's outriggers and the crane tipped into a building; that Irvin Eckerd's mistake was that he asked the people that he was working for how much the chiller he was lifting with his crane weighed, it turned out that the object he was lifting weighed more than he was told and his crane tipped into a building; that Eckerd's mistake was an honest mistake, he was a good employee, had a good attitude and never turned down work; and that he fired Damien Bergbauer for negligence in that while operating a crane Bergbauer took out a light pole, and when he asked Bergbauer about what happened he noticed that Bergbauer's eyes were bloodshot, he smelled of alcohol, and he admitted that he was partying the night before and did not get much sleep.

Sigmon testified on cross-examination that in 1995 he tipped an 85 ton crane over; that

the crane was 6 month old; that it was a bad call on his part; that he could only run short outriggers on one side and he could only tell the computer either long outriggers on both or short; that to pick the load up he set the computer on long outriggers and as he swung the load over to the short side to load the Florida Power and Light 32,000 pound pole on a truck the crane tipped over; that there was quite a bit of damage in that the whole boom section was torn out along with the lower cab; and that he was not disciplined, he was given a drug test and put back on his old crane, and he was given back the new crane when it was fixed. On redirect Sigmon testified that the crane he tipped over had a computer load chart; and that it was his fault that the crane tipped over. On recross Sigmon testified that he has been in the Union for a number of years and he is vested with the Union; that when he tipped the crane over it was the first time that he worked on a crane with a computer; that he picked outriggers fully extended on the computer because the poles he needed to pick up were a good ways off from the crane; that dispatcher Ernie Norris, who was a supervisor who operated a crane for years, told him that was what he was going to have to do, namely run long outriggers on the pickup side and run short outriggers on the drop-off side because there was not enough room on the drop-off side to get his outriggers out all the way and the truck beside him because of the swampland on that side; that he had already picked up 76,000 pounds with short outriggers, with less boom out, and he "felt like ... [he] didn't have anything to worry about there because ... [he had] already been there. That was my mistake" (transcript page 464); that he probably would not have done anything different if the computer had not been on the crane; that he did not forget anything or overlook anything; that he made a bad decision the day he tipped the crane over; that the computer actually had nothing to do with the incident; and that in his 27 years he has never tore up anything other than that crane. On further redirect Sigmon testified that he used the computer in the crane for 6 months before he tipped the crane over; that while he follows the dispatcher's instructions with respect to going to a job, when he arrives at the job he makes the decisions on the best way to complete the job; that once he backed into a building when two people were suppose to tell him when to stop, and another time he backed into a transformer; that he knocked the bearing wall of the building down; that when he hit the transformer he knocked the power out in a building; and that if he had brought the boom in a little more and added another two counterweights, he probably would not have tipped his crane over.

Rebston testified that in August 2002 he had an accident with his crane when the people who were helping him put a jib back on the crane did not control it and it damaged an automobile; that he was not disciplined for the accident; that years ago the outrigger of a boom truck (small crane) went through a septic tank and the crane went over on a building; and that no one knew that there was a septic tank there. On cross-examination Rebston testified that the damage to the car occurred on August 5, a couple of weeks after he signed the above-described petition; and that the person holding the jib should have been able to control it while he, Rebston, was fixing the cable.

Those paragraphs included in number 1 and 6 of the Respondent's September 25 position statement to the Board were offered and received as General Counsel's Exhibit 11. They read as follows:

Sunbelt discharged Jonathan Pollock because he took part in an altercation at Circles Restaurant in Apollo Beach whereby Pollock and his friends confronted and later challenged certain Sunbelt employees in a violent and aggressive manner. On July 26, 2002, at Circles Restaurant, Pollock and some unknown friends approached Sunbelt employee Mitch McDonald, and stated, 'congratulations on being the biggest piece of shit there ever was.' McDonald and Christie Granowicz, the daughter of Sunbelt owner and President Donald Granowicz were, at the time, entertaining Sunbelt clients. Shortly thereafter, McDonald decided that, based on the comment made by Pollock's friend, the

group should leave the restaurant. While standing outside the restaurant, a vehicle driven by one of Pollock's friends drove directly at McDonald and Christie Granowicz, just barely missing them. Soon thereafter, the same person that had earlier confronted McDonald got inside the vehicle and threatened McDonald with a gun stating, 'I will shoot you and Christie.' McDonald notified a nearby Sheriff's deputy, who interviewed the witnesses and filed a report.

On or about July 30, 2002, Donald Granowicz, owner and president of Sunbelt, met with Pollock to discharge him for his involvement in the above-referenced incident. Present at that meeting were two Hillsborough County Sheriffs' deputies who were in the process of investigating the incident at the restaurant involving Pollock and his friends. It should be noted that, at the time Pollock was discharged, he was not engaging in protected activity, and certainly was not doing so when he and his friends threatened McDonald and Christie Granowicz at the restaurant. Moreover, at the time of his discharge, Pollock did not dispute the fact that he was involved in the incident, and did not reference his union activity or otherwise complain that his termination was due to his previous engagement in protected, concerted activity. The mere act of a prior engagement in union activity does not in and of itself, shield an employee from future discipline when they conduct themselves in an aggressive and potentially violent manner.

....

Sunbelt discharged Ernest Snider because he not only engaged in inexcusable negligence while operating a crane, but attempted to conceal his negligence thereby potentially preventing Sunbelt and the insurance company from properly investigating the accident. On August 22, 2002, Snider was operating a 40-ton Terex Crane. While attempting to lift a palm tree off of a trailer, Snider failed to extend the outriggers on the left side of the crane. It is considered basic procedure to fully extend the outriggers when operating the crane to lift an object. Snider's negligence in failing to fully extend the left side outrigger caused the crane to 'tip-over' on its left side. The accident caused extensive damage to the 'jib,' lower cab and boom of the crane. The estimated cost required to repair the crane is between \$25,000 and \$40,000. This estimate does not include the undetermined lost revenues due to the crane being out of service.

Snider had no intention of accepting responsibility for his negligence, rather, he tampered with the accident scene in a failed attempt to conceal his negligence. Specifically, Snider moved the two left side outrigger pads from their accident location (which is not where they were supposed to be) to where they would have been had the left side outrigger been properly extended. This act was witnessed by Sunbelt employee, David May, and Sunbelt customer Bill Previt of Previt Tree Service. Snider then took a shovel and tried to fill in the holes caused by the misplaced outrigger pads. The purpose of filling in the holes was to conceal the fact that the left side outrigger was not fully extended. May and Previt confronted Snider about his actions, and cautioned him against tampering with the accident scene.

Prior to causing the crane accident, Snider received a written reprimand for purposefully operating a crane in violation of Sunbelt and Department of Transportation ('DOT') regulations. Specifically, on August 20, 2002, Snider left the Sunbelt property in a 150 ton Hydro Crane without the crane's boom properly secured in the dolly. The DOT requires that any crane, when operated on state highways, must have the boom properly secured in the dolly. Snider's failure to properly secure the boom subjected Sunbelt to

the possibility of severe fines and sanctions.

Sunbelt discharged Snider because he (a) failed to follow Sunbelt and DOT regulations, (b) engaged in inexcusable negligence that caused extensive damage to the crane he was operating, and (c) attempted, and almost succeeded in, concealing his negligence. There is no basis in fact for the Union's allegation that Snider was discharged for engaging in protected, concerted activities.

Analysis

Paragraph 5 of the complaint alleges that on or about July 18, 2002, the Respondent, by Horace Mitchell McDonald, by radio/cell phone, at its Tampa facility (a) interrogated employees about employees' union activities, and (b) threatened employees with discharge if they engaged in activities on behalf of the Union. On brief Counsel for General Counsel contends that if an employer threatens an open union supporter while interrogating the employee, then there is a violation regardless of the employee's open support for the Union, *Miller Electric Pump and Plumbing*, 334 NLRB 824 (2001); that even if Pollock and all of the other employees who attended the meeting on the morning of July 18 supported the Union and made no effort to conceal that support from Respondent, McDonald's interrogation of Pollock was unlawful because he combined it with a threat to discharge; and that Rebston is a current employee who has nothing to gain from his testimony, *Jackson County Commission on Aging*, 339 NLRB No. 119 (2003). The Respondent on brief argues that Pollock's version of his conversation with McDonald on July 18 is nearly identical, except that Pollock claimed that McDonald asked for the identity of the employees who were involved in the meeting; that Pollock could not have been too offended by McDonald's choice of words considering the fact that he asked McDonald "are you threatening my fucking job"; and that McDonald took no part in the eventual termination of Pollock.

As pointed out in *Flexsteel Industries*, 316 NLRB 745 (1995) and *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn 22 (1977), testimony of a current employee, Rebston, that contradicts statements of his supervisor, McDonald, is likely to be particularly reliable. As Rebston testified, and as corroborated by the testimony of Jonathan Pollock and Snider, McDonald interrogated Pollock and in the same conversation McDonald threatened Pollock with discharge. Contrary to his testimony, McDonald had spoken to Childers before he spoke with Pollock so McDonald already knew that a Union representative was on site getting signatures from Respondent's employees. As indicated by Counsel for General Counsel on brief, even if Pollock was considered an open and active union adherent, the interrogation of such a person even about his own union sentiments becomes unlawful once the employer threatens the employee with discharge. Here the interrogation went beyond that since McDonald asked what the Union was doing there and why Pollock was trying to organize the employees. The interrogation under the circumstances involved here was coercive. McDonald's testimony that he did not threaten Pollock's job is not credited. On July 18 Pollock had Childers telephone McDonald to find out if he still had a job. Childers did not testify at the trial herein to deny this testimony. Pollock's testimony is credited. Since McDonald was on the speaker phone, all the employees who overheard the threat had to understand that if they engaged in the same conduct as Pollock, they would be subject to the same treatment. Also, Rebston, in addition to Pollock and Snider, testified that Snider told McDonald that he had to be careful with respect to what he said. McDonald's testimony that Snider did not say a word to him during this conversation is not credited. Snider made the statement. While only Pollock heard McDonald's reply, this was due to the fact that Pollock switched the Nextel unit off speaker phone and at that point only Pollock could hear what McDonald was saying. Pollock's testimony on this point is credited. Once again McDonald threatened discharge. The Respondent violated the Act as

alleged in paragraph 5(a) and (b) of the complaint.

Paragraph 6 of the complaint alleges that on or about July 31, 2002, the Respondent, by Donald Granowicz, at its Bradenton facility (a) told employees that it would be futile to select the Union as their collective-bargaining representative and that Respondent would never sign a collective-bargaining agreement with the Union, (b) interrogated employees about their union activities, (c) threatened to reduce employees' wages if they joined the Union, and (d) threatened to discharge employees if they engaged in activities on behalf of the Union. On brief Counsel for General Counsel contends that as current employees, the testimony of Cabal, Sigmon, Rebston and Johnson should be credited, particularly where their testimony contradicts that of Respondent's witnesses, *Jackson County Commission on Aging*, supra; that when Donald Granowicz told the employees that he would never sign a Union contract and that as far as he was concerned there would be no union in the company if he had to fight to his dying breath, he imparted the futility of selecting the Union; that when Donald Granowicz asked Cabal why the employees were doing this to him, considering the timing of the meeting and in view of Donald Granowicz's subsequent anti-union threats, he was referring to the Union campaign, and Respondent unlawfully interrogated employees; that it does not matter if Cabal and the other employees were open supporters of the Union because Donald Granowicz threatened employees during the same meeting that he interrogated them, *Miller Electric Pump and Plumbing*, supra; that the Respondent violated the Act when Donald Granowicz asked mechanic Loudermilk either why he would be willing to join the Union when he would be making less money, or why he wanted to take a cut in pay; that Donald Granowicz did not state a belief that the Union would only sign a standard contract; that Donald Granowicz's assertion that selecting the Union would necessarily result in lower wages is a threat that would coerce reasonable employees to abandon their support for the Union; that Donald Granowicz's statement that he would lock the gates before dealing with the union is an expression of the futility of electing the Union; and that in the context of the statements made to the employees at this meeting, when Donald Granowicz told employees that they could leave if they did not like things, he threatened the employees with discharge if they engaged in activities on behalf of the Union because the employees could not support the Union and continue to work for the Respondent, *Equipment Trucking Co.*, 336 NLRB No. 20 (2001). The Respondent on brief argues that Donald Granowicz referenced the Union's contract by commenting that the mechanics, including Loudermilk, would make less money under the rates offered by the Union in its contract; and that while Donald Granowicz did in fact tell the employees that Sunbelt could not afford a pay raise for the crane operators, as contemplated in the Union's contract, it was clearly not a statement that Sunbelt would not bargain with the Union, rather the statement was based on the fact that the Union's contract contained a most favored nation's clause which prohibited it from agreeing to terms that were different or better than those already contained in the contract.

Donald Granowicz did tell the employees at this meeting that it would be futile to select the Union as their collective-bargaining representative and that Respondent would never sign a collective-bargaining agreement with the Union. He never explained the favored nations clause to the employees and he never indicated to the employees that this was the reason that he would not sign the Union contract that was given to him. Donald Granowicz did not speak in terms of the contract with the favored nations clause. Rather he spoke in terms of never, to his dying breath, signing a collective bargaining agreement with the Union. The testimony of the current employees is credited.

Loudermilk signed the above-described July 18 Union petition. Donald Granowicz asked Loudermilk during this meeting why he supported the Union if it meant he was going to take a cut in pay. Donald Granowicz unlawfully interrogate Loudermilk in front of the other employees. In view of the threats made during this meeting, the interrogation was coercive. Donald

Granowicz also conveyed the impression that Loudermilk, and others in his situation, would indeed suffer a cut in pay if the Union was their collective bargaining representative. Kell testified that the favored nations clause was not in the Union contract for a period of time, it was in the standard one-year contract he gave to Donald Granowicz, but that it was going to be taken out because it was destructive to organizing efforts. Consequently, it is questionable whether if and when the Respondent negotiated with the Union the favored nations clause would even be a factor. In these circumstances, Donald Granowicz could not say with certainty that Loudermilk would take a cut in pay under a collective bargaining agreement negotiated with the Union. To approach it as a foregone conclusion conveyed the message that if the employees successfully supported the Union, at least some would have their wages reduced. Also Donald Granowicz did not specifically deny that he told the employees that if they joined the Union they would lose their vacation time. Johnson's testimony is credited. The Respondent unlawfully interrogated the employees, threatened to reduce their wages, and take away their vacation time if they joined the Union.

Counsel for General Counsel correctly points out that in the context of the statements made to the employees at this meeting, when Donald Granowicz told employees that they could leave if they did not like things, he threatened the employees with discharge if they engaged in activities on behalf of the Union because the message conveyed was the employees could not support the Union and continue to work for the Respondent, *Equipment Trucking Co.*, supra.

Paragraph 7(a) of the complaint alleges that on or about July 31, 2002 the Respondent unlawfully discharged its employee Jonathan Pollock. On brief Counsel for General Counsel contends that Donald Granowicz made the decision to terminate Jonathan Pollock without giving Pollock any opportunity to give his version of the events; that the Respondent was aware of Pollock's union activity; that there is ample evidence of Respondent's animus toward the Union and the employees' union activity; that McDonald threatened to discharge Pollock for engaging in union activity and McDonald expressed Respondent's union animus by telling Pollock that he sounded just like one of those "Union fucks"; that Donald Granowicz's unlawful conduct during his meeting with the Bradenton employees provides further evidence of Respondent's animus toward the Union; that McDonald's threat, Donald Granowicz's unlawful conduct with the employees at Bradenton, and his indication to the Sheriff's Deputy that he, Donald Granowicz, was having some union problems with Pollock clearly establish a nexus between Pollock's union activity and his discharge; that General Counsel has established a prima facie case; that Respondent did not prove that it would have discharged Pollock in the absence of his union activity; that Respondent used the events at Sidelines as a pretext for discharging Pollock; that there is no credible evidence that Pollock took any action that would have led Christie Granowicz or McDonald to believe that Pollock did anything other than try to keep the situation calm; that Donald Granowicz made it clear to Union members he hired that Respondent is non-union and that they can work for Respondent only so long as they understand that Respondent will continue to operate non-union¹⁰; that Respondent's failure to state a reason for firing Pollock in its discharge notice, while indicating that Pollock engaged in no misconduct, is additional evidence that Respondent discharged Pollock for union activity rather than because of anything that happened at Sidelines; and that the evidence shows that Respondent's discharge of Pollock was motivated, at least in part, by Respondent's anti-union animus. The Respondent on brief argues that following the meeting at Circles Donald Granowicz decided to terminate Pollock; that the testimony established that Donald Granowicz believed, whether he was right or wrong, that Pollock was involved in an incident whereby

¹⁰ Donald Granowicz testified that he tells Union members "we operate non-union, and if you're willing to work on that basis, I don't really care that you're union." (transcript page 33)

Donald Granowicz's daughter and manager were threatened with a gun; that with respect to *Wright Line, Inc.*, 251 NLRB 1083 (1980) the Respondent concedes that Counsel for General Counsel has shown that Pollock (1) engaged in union activity, (2) Respondent was aware of this, and (3) Pollock suffered an adverse employment action; that there is insufficient evidence to establish a link between Pollock's union activity and his subsequent discharge and even if Counsel for General Counsel did establish the nexus, Respondent presented ample evidence that it would have taken the same action in the absence of the protected conduct; and that even if the record evidence revealed that Donald Granowicz was mistaken in his understanding of what transpired, as long as his belief was sincere at the time he made the decision, Pollock's termination must be upheld, and the Section 8(a)(3) allegation dismissed.

As set forth in *Wright Line, Inc.*, supra at 1089, enf'd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U. S. 393 (1983)

We shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or 8(a)(1) turning on employer motivation. First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [footnote omitted]

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

Christie Granowicz telephoned her father the morning after the incident and told him what happened. Donald Granowicz testified that he decided to terminate Pollock when he got off the telephone with his daughter, Christie, because he felt that Pollock had endangered his daughter's and McDonald's lives, and it was his understanding that Pollock told the other man "to show him your gun and you better be careful, he'll shoot your ass." (transcript page 52). When Christie testified about Jonathan Pollock at the trial herein she testified that Jonathan Pollock and Cable come into the parking lot, Cable acted like he is pulling out a gun, pointed his finger and said "I can put a cap in every single one of you ... pointing at all of us" (transcript page 555 and 556), and "this girl comes flying around the corner in her Mustang at me ... coming at high speeds or whatever, and cuts off at the last second, rolls down the window and started ... telling Mitch she's going to call his wife and tell his wife that she's [sic] out with me and whatever" (transcript page 556); that she did not see Jonathan Pollock inside the bar at Sidelines; and that outside in the parking lot Jonathan Pollock did not say anything, "[h]e was standing there with the guy when the guy was threatening to put a cap in our heads." (transcript page 562) If Christie Granowicz told her father more than this about Pollock when she telephoned him that morning, she did not make it a matter of record at the trial herein. Again, Christie Granowicz testified at the trial herein that outside in the parking lot Jonathan Pollock did not say anything. Where did Donald Granowicz come by his understanding that Pollock told the other man "to show him your gun and you better be careful, he'll shoot your ass?" (transcript page 52). Christie Granowicz did not testify that she told her father this. And when he decided to terminate Pollock, Donald Granowicz, according to his testimony, was relying only on what his daughter told him. Even if it is subsequently argued that Donald Granowicz did not come by this understanding from Christie Granowicz, it is not clear how he would have come by this

understanding. Donald Granowicz was not present at the involved incident and none of those present at the incident testified that Pollock made this statement. As noted above, on brief the Respondent argues that even if the record evidence revealed that Donald Granowicz was mistaken in his understanding of what transpired, as long as his belief was sincere at the time he made the decision, Pollock's termination must be upheld, and the Section 8(a)(3) allegation dismissed. It appears that the Respondent is arguing that Donald Granowicz acted in good faith, and so even if he was mistaken, the discharge should be upheld. As it relates specifically to relayed observations of those present regarding Pollock, Donald Granowicz was being told about something that happened in the parking lot of a bar at 2 a.m. after the individuals involved in the incident had apparently been consuming alcoholic beverages for hours. In such a situation how can someone claim that he acted in good faith when he did not even give Pollock the opportunity to explain what happened. Donald Granowicz's understanding that Pollock told the other man "to show him your gun and you better be careful, he'll shoot your ass" (transcript page 52) is a fabrication. There was no sincere belief at the time Donald Granowicz made the decision to terminate Pollock. Counsel for General Counsel has made a prima facie showing regarding the Pollock discharge. The Respondent has not shown that the same action would have taken place even in the absence of the protected conduct. The Respondent violated the Act as alleged in paragraph 7(a) of the complaint.

Paragraph 7(b) of the complaint alleges that on or about August 22, 2002 the Respondent unlawfully discharged its employee Ernest Snider. On brief Counsel for General Counsel contends that the Respondent would not have discharged Snider in the absence of his union activity; that Respondent's assertion that it relied on past accidents, customer complaints, and Snider's attitude for discharging him are pretexts; that Snider did not attempt to cover up the cause of the accident and Respondent's assertion that it relied on such an attempt is a pretext; that Respondent's assertion that Snider's departure from the yard without a dolly played a role in its decision to discharge Snider is another pretext; that Respondent offered shifting defenses; and that Respondent failed to carry its burden to prove by a preponderance of the evidence that it would have discharged Snider for lawful non-discriminatory purposes, despite his Union activity. The Respondent concedes that Counsel for General Counsel has shown that Snider (1) engaged in union activity, (2) Respondent was aware of this, and (3) Snider suffered an adverse employment action. The Respondent on brief argues that Counsel for General Counsel failed to prove a connection between Snider's protected activity and his termination; that Snider admitted that his negligence caused a crane accident; that the Respondent has terminated employees before for crane accidents caused by their negligence; and that Respondent has shown that it would have terminated Snider in the absence of any protected activity.

Counsel for General Counsel has made a prima facie showing. I do not believe that Snider attempted to cover up the cause of the accident. In its position statement Respondent claimed that May and Privett confronted Snider about his actions, and cautioned him against tampering with the accident scene. Only Privett testified at the trial herein, and he did not make this claim. Privett did testify that Johnson and May told Snider not to "mess" with the scene. May did not testify. And not only did Johnson deny Privett's testimony, but Johnson testified that he helped Snider (1) free up the jack cylinders by removing the pads which were in a bind so the crane would not be further damaged, (2) move the pads so they would not be in the way, and (3) fill in the holes so they would not be a hazard to those who would work on the crane to right it. There were witnesses there at the time, including Privett, and Snider never denied that the accident was his fault. Snider did not attempt to cover up the accident. But operating a crane is an inherently dangerous task. On August 22 Snider let his frustration with the circumstances he found himself in with the crane he was operating get the best of him. As noted above, the crane was getting stuck and Childers failed for the second day to provide the correct plywood. In his

frustrated state Snider completely forgot a basic, namely to put the outriggers out before making a lift. Unlike Sigmon's accident, Snider did not take a calculated risk with the approval of the dispatcher. Snider's accident was more like the Wayne Lowe accident where he negligently dropped a pallet of roofing tiles through three floors of the Holiday Inn, luckily not killing anyone. Snider could have killed someone. If one of the laborers or Privett had moved to the left side of the crane to help place the tree in the hole, that person might have been killed. Counsel for General Counsel has not shown that Snider was treated disparately. In my opinion the Respondent has demonstrate that Snider would have been terminated even in the absence of the protected conduct. Respondent did not violate the Act as alleged in paragraph 7(b) of the complaint.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by (1) interrogating employees about employees' union activities, (2) threatening employees with discharge if they engaged in activities on behalf of the Union, (3) telling employees that it would be futile to select the Union as their collective-bargaining representative and that Respondent would never sign a collective-bargaining agreement with the Union, and (4) threatening to reduce employees' wages or take away vacations if they joined the Union.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Jonathan Pollock because he joined, supported, and assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Jonathan Pollock, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Sunbelt Cranes, Construction & Hauling, Inc., of Tampa, Florida, its
 5 officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about employees' union activities.

(b) Threatening employees with discharge if they engaged in activities on behalf
 10 of the Union.

(c) Telling employees that it would be futile to select the Union as their collective-
 15 bargaining representative and that Respondent would never sign a collective-bargaining
 agreement with the Union.

(d) Threatening to reduce employees' wages or take away vacations if they
 20 joined the Union.

(e) Discharging Jonathan Pollock because he joined, supported, and assisted the
 Union, and engaged in concerted activities, and to discourage employees from engaging in
 these activities.

25 In any like or related manner interfering with, restraining, or coercing employees in the
 exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

30 Within 14 days from the date of this Order, offer Jonathan Pollock full reinstatement to
 his former job or, if that job no longer exists, to a substantially equivalent position, without
 prejudice to his seniority or any other rights or privileges previously enjoyed.

35 Make Jonathan Pollock whole for any loss of earnings and other benefits suffered as a
 result of the discrimination against him in the manner set forth in the remedy section of the
 decision.

40 Within 14 days from the date of this Order, remove from its files any reference to the
 unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been
 done and that the discharge will not be used against him in any way.

45 Preserve and, within 14 days of a request, or such additional time as the Regional
 Director may allow for good cause shown, provide at a reasonable place designated by the
 Board or its agents, all payroll records, social security payment records, timecards, personnel
 records and reports, and all other records, including an electronic copy of such records if stored
 in electronic form, necessary to analyze the amount of backpay due under the terms of this
 Order.

50 Within 14 days after service by the Region, post at its facilities in Tampa and Bradenton,

Florida copies of the attached notice marked “Appendix.”¹² Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 18, 2002.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

John H. West
Administrative Law Judge

¹² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board has found that we violated Federal labor law and has
ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15 Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

20 WE WILL NOT interrogate you about your union activities.

WE WILL NOT threaten you with discharge if you engage in activities on behalf of the
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 925, AFL-CIO.

25 WE WILL NOT tell you that it would be futile to select INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 925, AFL-CIO as your collective-bargaining representative
and that we would never sign a collective-bargaining agreement with INTERNATIONAL UNION
OF OPERATING ENGINEERS, LOCAL 925, AFL-CIO.

30 WE WILL NOT threaten to reduce your wages or take away vacations if you join
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 925, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the
exercise of the rights guaranteed you by Section 7 of the Act.

35 WE WILL, within 14 days from the date of the Board's Order, offer Jonathan Pollock full
reinstatement to his former job or, if that job no longer exists, to a substantially equivalent
position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

40 WE WILL make Jonathan Pollock whole for any loss of earnings and other benefits resulting
from his discharge, less any net interim earnings, plus interest.

45

50

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jonathan Pollock, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

Sunbelt Cranes, Construction & Hauling, Inc.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530, Tampa, FL 33602-5824

(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2662.